

IN THE MATTER of a public
complaint of D.B., Z.B., and K.B.
Against Constables B.M., S.S., and I.W. made under
The *Royal Newfoundland Constabulary Act 1992*

Decision re Preliminary Application of the Chief of Police for Standing
(Heard October 1, 2020)

The Royal Newfoundland Constabulary Chief of Police (“the Chief”) has applied for standing as a full participant in the hearing of this public complaint of D.B., Z.B., and K.B as against I.W., B.M., and S.S. (“the Constables”) under s.30.(1)(e) of the *Royal Newfoundland Constabulary Act, 1992* (“the Act”).

For reasons noted below, the Application is granted, in part.

Position of the Chief

The Chief indicates that he takes a substantial interest in the subject matter of this public complaint hearing because the findings which result from this hearing will be specifically relevant to the future operations of the Royal Newfoundland Constabulary (“the RNC”) and the RNC may be adversely or positively affected by these findings. The Chief submits this to be the case, because following the hearing, and beyond making findings affecting the individual officers involved, pursuant to s.35 of the Act the adjudicator has the ability to make recommendations in relation to matters of concern or interest to the public relating to police services to the Minister of Justice (“the Minister”), which could have far reaching implications for the current and future operations of the RNC.

The Chief also submits that his participation in this hearing will contribute to the openness and fairness of the hearing and will further the conduct of the hearing. The Chief is uniquely positioned to facilitate and expedite access to all relevant RNC policies, protocols, manuals, information and witnesses in order to shed as much light as possible and the events and circumstances to be examined in the course of the hearing.

The Chief further submits that given the role and broad responsibilities of the Chief of Police set out in s.6 of the Act, there is an inference that arises via the nature and purpose of the RNC public complaints regime, including the subject matter of complaints, investigations, proceedings, as

well as orders and recommendations arising from the same, that the Chief inherently has a substantial interest in RNC public complaints.

Position of the Constables

The Constables submit the Chief does not have a substantial interest in this complaint.

Constable I.W. submits that the fact I am to provide the Chief with any Order I may make under s.33 (which the Chief also made submissions in relation to) of the Act after the hearing, does not mean the Chief has a substantial interest in the complaint, but that this is more a function of the Chief having the order so that he may implement it. Constable I.W. further indicates that any Order I may make would affect only a particular Officer, and not the entire RNC.

Constable I.W. also takes the position that that fact I may provide recommendations under s.35 of the Act respecting matters of concern or interest to the public relating to police services by sending such recommendations to the Minister, does not mean the Chief has a substantial interest in the complaint. Constable I.W. says it is highly unlikely that any such recommendations will follow a hearing which concerns non-commissioned frontline officers. Constable I.W. says there are no charges or questions in this matter that could lead to any recommendations to the Minister concerning the delivery of public services and thus the Chief cannot be said to have any substantial interest in the outcome based on s.35 of the Act.

Constable I.W. says that what the Chief is proposing (presumably in terms of his participation) is so vague that he should not be granted standing. The Chief has not provided any reasons as to why he should be granted status in the view of Constable I.W. other than he is the Chief, and there could be recommendations pursuant to s.35.

Constable S.S. submits that the right of standing given to the Chief under s.30.(1)(d) of the Act, necessarily narrows the Chief's right to participate to circumstances where that particular section applies. Should the legislature have wanted to give the Chief the right of participation sought in this instance, it would not have narrowed the ability to participate in the way it has. In the result, Constable S.S. says the Chief has a statutory right to appear before a Commission explicitly in an appeal of a decision of the Chief. Constable S.S. says to grant the Chief standing would be contrary to legislation and should not be permitted.

Constable S.S. also takes the position not entirely dissimilar from that of Constable I.W. in relation to s.33 of the Act, and says that the fact I am to provide the Chief with any Order I may make

under s.33 means that the legislature did not intend for the Chief to be a party. As to s.35 of the Act and recommendations I might make to the Minister, Constable S.S. says this does not translate into the Chief having a substantial interest, and that the interest of the complainants and the broader interest of the public is carried by Commission Counsel in matters referred to the Commission.

Constable S.S. further submits that the within Application by the Chief is a premature one. He suggests that the Chief is mostly concerned about policy and I have not made any findings yet as to whether or not allegations have been made out (and therefore presumably in his view whether any orders or recommendations are even needed). Constable S.S. says an Application, if it is to be made, should be once the hearings are over and findings have been presented.

Constable B.M.'s submissions were largely in line with those of the other officers. He indicated as this is not a policy complaint, but a complaint against the actions of individual officers, that an argument that the Chief should be entitled to have standing because there may be policy recommendations that could affect the RNC, falls short. He further submits that the substantial interest required under s.30.(1)(e) must be assessed on a case by case basis.

Position of the RNC Public Complaints Commission ("the Commission")

The Commission has indicated they take no position as to the request of the Chief to be granted standing as a full participant. They neither support nor oppose the Application of the Chief to be granted standing in this matter. However, I note that the Commission has indicated in their written submission that if the Chief is to be granted standing as a full participant it must be done under s.30.(1)(e) of the Act and this necessitates me being satisfied that the Chief has a substantial interest in the complaint. As such, the Commission is taking a position in the sense that they deem s.30.(1)(e) to give me the authority to grant the Chief standing, should I be inclined to do so. This is in contrast to the position of Constable S.S. who indicates that the inclusion of the Chief as a party under s.30.(1)(d) and lack of specific mention of the Chief under s.30.(1)(e) narrows the Chief's entitlement to be granted standing as a party to matters which fall under s.30.(1)(d).

The Commission also noted that giving the Chief standing in this matter does not necessarily mean he gets standing in all matters. In other words, the Commission denounces the floodgates argument.

Analysis

Substantial Interest

The parties are *mostly* in agreement that s.30(1)(e) applies here, and that for the Chief to participate in the hearing of this complaint, he must satisfy me that he has substantial interest in the complaint.

s. 30.(1) of the Act states:

Parties to proceeding

30. (1) The parties to a proceeding before an adjudicator are
- (a) the commissioner, who shall have the carriage of the matter;
 - (b) the complainant;
 - (c) the police officer who is the subject of the complaint;
 - (d) the chief, in the case of an appeal by the police officer who is the subject of the complaint; and**
 - (e) a person who satisfies the adjudicator that he or she has a substantial interest in the complaint.**

(emphasis mine)

What is a substantial interest? The definition of substantial submitted by the Chief indicates the word to mean an “important” or “essential” interest, or “considerable value”. I agree with this definition of the word as it relates to the context of this Application.

Does the Chief have a substantial interest in the complaint of D.B., Z.B., and K.B?

Does the Chief have a substantial interest (as defined above) in the context of this complaint?

I generally agree with Constable I.W. that the fact I am to provide the Chief with any Order I may make under s.33 of the Act after the hearing, would affect only a particular Officer, and not the entire RNC. However, this in my view does not eliminate the Chief having a substantial interest in the complaint, but assists with indicating that he does.

Orders of adjudicator

33.

(4) An order or recommendation of an adjudicator shall be made in writing, together with a statement of the reasons for the order or recommendation, and a copy shall be provided to the commissioner, the chief and all parties.

Given the Chief must be provided with (and surely help implement) an Order or recommendation I provide, and that such Order or recommendation will result from the evidence which comes from the hearing of the complaint, the Chief should be able to participate in this hearing to an extent. Further and more importantly, s.6 of the Act notes various responsibilities of the Chief that in my view expect of him in a complaint such as the within one, to ask questions which could better inform him and enable him to carry out such duties:

Administration

6. (1) The chief shall

- (a) establish and determine within the constabulary the rank of each police officer other than commissioned officers;
- (b) recruit and appoint police officers to the constabulary;
- (c) after the end of each calendar year file with the minister an annual report on the affairs of the constabulary;
- (d) establish and enforce rules respecting policies and procedures for the effective management and control of the constabulary;
- (e) monitor the constabulary to ensure that adequate and effective police service is provided in the province;
- (f) monitor the constabulary to ensure that police officers and other constabulary employees comply with required standards of service and discipline;
- (g) administer discipline in accordance with this Act;
- (h) develop and promote programs to enhance professional police practices, standards and training;
- (i) conduct a system of inspection and review of the constabulary;
- (j) assist in the co-ordination of police services in the province;
- (k) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;

- (l) issue orders, directives, rules and guidelines respecting policy and matters relating to the constabulary, police services, police officers and other constabulary employees; and
- (m) develop and promote programs for community oriented police services.

Section 35 of the Act affords me the ability to make recommendations to the Minister in addition to any Order or recommendation I make under s.33.

Recommendations

35. Notwithstanding section 33 and an order which the adjudicator may make, the adjudicator may also make recommendations respecting matters of concern or interest to the public relating to police services by sending the recommendations, with supporting documents, to the minister.

It is in large part the oral evidence which results from questions posed by the parties, which helps lead to a decision in relation to the complaints, that may assist me in recommendations under s.35 as well. Surely if I were to make recommendations to the Minister respecting matters of concern or interest to the public relating to police services, the Chief has a substantial interest in the proceeding that precipitates such recommendations. In *Royal Newfoundland Constabulary Chief of Police v. Royal Newfoundland Constabulary Public Complaints Commissioner*, 2001, (NLSCTD) (“*Maloney*”) Mr. Justice Handrigan noted at paragraph 36:

...Such recommendations would certainly be of interest to the chief of police. However, the possibility of recommendations “relating to police services” flowing from a public hearing into a complaint by an individual is ancillary to and not the predominant purpose of the legislation. It might support the applicant having party status, but it does not accord him the full right of participation that is enjoyed by the other participants.

Constable I.W. as noted says that is unlikely recommendations will follow a hearing which concerns non-commissioned frontline officers. Mr. Justice Handrigan intimated as much in *Maloney* as well. However, it is certainly possible, and I believe that possibility in this case invokes a substantial interest and supports the Chief having party status. The Commission also acknowledged this possibility at the hearing of this Application.

I don't disagree with Constable S.S. that the interest of the complainants and the broader interest of the public is carried by Commission Counsel in matters referred to the Commission. This does not in my view mean that the Chief cannot be said to have a substantial interest in the complaint, and one that can easily be said to differ in ways from that of the Commission.

I agree with the Chief that the primary objective of the public complaints scheme is to maintain public confidence in the RNC as a provincial police service and to ensure the public interest is served to the greatest extent possible by the police service. This position was supported by our Court of Appeal in *The Royal Newfoundland Constabulary Public Complaints Commission v. McGrath* (2002) (NLCA).

Inclusion of the Chief as a party under s.30.(1)(d) and lack of specific mention under s.30.(1)(e)

I am not prepared to agree with Constable S.S. that inclusion of the Chief as a party under s.30.(1)(d) of the Act and lack of specific mention of the Chief under s.30.(1)(e) of the Act narrows the Chief's entitlement to be granted standing as a party to matters which fall under s.30.(1)(d). I agree with the views of Constable S.S. as to statutory interpretation, which is to adopt the view noted in *Rizzo & Rizzo Shoes Ltd., Re*, 1998, (SCC) quoting from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) that:

...there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

These sections, read as prescribed above, indicate to me that s.30.(1)(d) was intended by the legislature to necessitate the Chief's participation in an appeal, but not to also preclude it in the case of a matter that is not an appeal. In fact in this particular legislation, as per submissions of the Chief, section 22.(1) carves out an exception in relation to who can file a complaint. As such, if the Chief was meant to be exempt from those under s.30.(1)(e) who had the right to establish they have a substantial interest in the complaint, then surely such exception would have been explicitly noted there.

Last, it is not without precedent that the Chief be granted standing pursuant to s.30.(1)(e) of the Act, as we know that to have been the case (albeit by consent) in a matter which led to an appeal of a decision in relation to calling of expert evidence in *Maloney*.

Is this Application Premature?

I do not accept the submission that the within Application by the Chief is a premature one. While allegations at this juncture have not, and may well not be made out, it is possible that they will

be. Whether or not they are made out will depend on the evidence presented at the proceeding and questions asked by the various parties. Questions asked by the Chief while not to have any impact on whether the allegations are made out or not, may be probative to me in terms of recommendations that might be made. As such the Chief should have the ability to ask questions at the proceeding, and it would be too late to make this Application once the proceeding is over and potential Orders and recommendations are already made based on what has come out of the proceeding.

Openness and Fairness

As to concerns as to whether the Chief has or will take a position of neutrality in this matter or that his involvement could usurp my decision-making ability, I should say first that this does not concern me. As the Commission rightly noted, as adjudicator I can determine in real time what is and what is not appropriate at the hearing. Moreover, I am less concerned at this stage with what the Chief will say or ask at the hearing than I am with whether at this point it can be said that he has a substantial interest in the complaint.

Nature of the Chief's Participation

I do not agree with Constable I.W. that what the Chief is proposing in terms of his participation is vague to the extent that he should not be granted standing. The Chief has been clear that he views his role in the context of RNC public complaints as that which does not include weighing into the merits of public complaints during hearings before the adjudicator. The Chief agrees that his involvement as a party within these proceedings would and should properly be limited to his role as Chief and that this would not extend to advocating on behalf of the complainants or the officers in the context of these proceedings on the merits of the public complaints. The Chief also submitted at the hearing of this Application the manner of questions he would likely ask, which is to say those that are not of an adversarial nature. Further, a fitting example of the nature of a Chief's participation in a public complaint was discussed in *Maloney* at paragraph 34:

...his interest in the proceedings before the adjudicator is limited to his role as Chief of Police, with responsibility for the control, administration and direction the Royal Newfoundland Constabulary in its delivery of police services. The Applicant may not, and this is conceded too, call evidence to explain or support his decision to dismiss the complaint in the first instance. ...

While in that case the Chief's participation was by consent (and restrictions were acknowledged), it still provides guidance as to what party status looks like for the Chief here. His Counsel submitted views at the hearing of this Application in line with this as well:

That's a good question and that was asked of me by counsel for the officers as well. And it's – I wonder – it's easier for me to describe it by way of exclusion. I think that's the clearest perhaps way, but I do have – so, I would exclude from the Chief's role involvement in the merits of the complaint. That's not – that is not the Chief's role. The Chief in this case actually referred the case to the Public Complaints Commission at an early stage. So, he's not – you know, he's not adjudicating on this matter. He's not – that's not the purpose. The purpose is not to indicate whether the officers should be disciplined or not. No intention to weigh into those matters. It is rather to – which is the unique part of the Chief's role, he's the only individual really who would – who could possibly represent the organizational interest here. I mean, not to say the officers can't represent the organization, but their focus is quite clearly upon their own – you know, the implications for them personally, which you know, it would be certainly a focus for them. But to represent the organization in these proceedings, given that the purpose of the proceedings are public, that's really the role of the Chief within these proceedings I would suggest. So, I don't – it wouldn't include – it's hard to be very specific about okay, well – I was asked, for instance, would the Chief ask the officer any questions, you know, Chief's counsel ask the officers any questions. I don't see it as an adversarial role whatsoever with respect to the officers or with respect to the complainants either. It's rather perhaps the questions that might lead to clarification. For instance, did you – on broader issues, like training, policy, that kind of thing, procedures. Would this – for instance, a question of the officer might be "would it help you if we had a policy such as this?" or "would it help you if you had received this type of training?" or "have you received this type of training? How do you see – how do you see the role of a supervisor?" for instance. Like you know, that kind of thing. So, to say I would, you know, as counsel for the Chief never ask a question, I can't say that. But I can say that it's not an adversarial role with respect to the merits of the complaint, because I would note too that Section 35 recommendations that may come from this, don't rely on a finding by you as adjudicator that the public complaint has any merit whatsoever.

Summary

The Chief has satisfied me he has a substantial interest in the complaint. In the result, the Application for standing under s.30.(1)(e) of the Act is granted, and the Chief shall be a party to the proceeding before me. However, his participation shall be limited as is dictated by his role as Chief of Police, with responsibility for the control, administration and direction of the RNC in its delivery of police services. The Chief may not call evidence in relation to the complaint nor any evidence (unless of course it has been consented to by the other parties and I am in agreement). He will not be a full participant as requested, in that his participation and questioning are to be aligned solely with his role as Chief of Police. Indeed notwithstanding the request for

participation as a full participant, the Chief has made it clear as noted above that he understands what his participation is to look like.

My decision is dictated by the legislation referenced and briefs and oral submissions of Counsel as they relate to the legislation and case law.

There is no Order as to costs.

Thank you to all Counsel for their submissions both oral and written.

The hearing of the complaint will proceed on November 2, 2020.

Dated this 18th day of October 2020
Andrew Wadden - Adjudicator